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No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.
Petitioners,

v.

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

At the liability stage of this employment discrimination action, the District Court determined that defendants' well intentioned policies, adopted in good faith, had a disparate impact on blacks in violation of Title VII. At the relief stage, it entered an injunction which included relief against subjective discrimination in hiring in violation of both Title VII and 28 U.S.C. § 1981. The Court of Appeals ruled that the challenged subjective discrimination had to be tested against the standards of disparate treatment, not disparate impact. It therefore held that a class-wide intent to discriminate was necessary to sustain the relief at issue. The question presented is whether, in going on to sustain the relief, the Court of Appeals acted in contravention of the subsequent decision of this Court in *Pullman-Standard v. Swint* by treating the issue of defendants' intent to discriminate as one of ultimate fact not subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a), and by substituting its own new finding that defendants had the requisite intent for the District Court's contrary finding.

PARTIES

Petitioners Baxter Travenol Laboratories, Inc. and Travenol Laboratories, Inc. are corporations organized under the laws of Delaware. (All of their domestic subsidiaries are wholly-owned.) Respondents are a class of black females who were employed at petitioners' facility in Cleveland, Mississippi on or after March 2, 1966, and black females with a tenth grade education or equivalent who applied for employment at this facility on or after March 2, 1966.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi, Delta Division, on petitioners' liability is reported at 416 F. Supp. 248, and appears in the Appendix at pages 1a-30a. The opinion of the United States Court of Appeals for the Fifth Circuit affirming in part and reversing in part is reported at 565 F.2d 895, and appears in the Appendix at pages 31a-37a. This Court's denial of a petition for certiorari is reported at 439 U.S. 835. The District Court's order

on relief from which the present petition arises is not reported and appears in the Appendix at pages 38a-45a. The opinion of the Court of Appeals regarding this order is reported at 673 F.2d 798, and appears in the Appendix at pages 46a-117a. The Court of Appeals' denial of petitioners' petition for rehearing and respondents' petition for rehearing and suggestion for rehearing *en banc* appears in the Appendix at page 118a.

JURISDICTION

The judgment sought to be reviewed was entered on April 22, 1982, and petitions for rehearing were denied on July 6, 1982. Jurisdiction of this Court is invoked under section 1254(1) of Title 28, United States Code.

STATUTES AND RULES INVOLVED

Federal Rules of Civil Procedure, Rule 52(a):

> Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of

law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Civil Rights Act of 1964 (Title VII), section 702(a):

Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer ——

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

On March 2, 1972, three blacks commenced this class action pursuant to the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981, alleging race discrimination in petitioners' ("Travenol") hiring, assignment, promotion and disciplinary practices. Jurisdiction existed in the District Court under 28 U.S.C. § 1331. On May 1, 1973, the District Court granted respondents' ("plaintiffs") motion to amend the complaint to include allegations of sex discrimination.

Pursuant to Fed. R. Civ. P. 23, the District Court defined the following class before trial:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

416 F. Supp. 248, 253 (App. 5a-6a).

A bench trial commenced on March 3, 1975. With regard to hiring, plaintiffs strived principally to prove that Travenol's requirement that production ("operative") employees have a tenth grade education or equivalent resulted in discrimination against the class. Plaintiffs also asserted that Travenol's interviewing procedures resulted in discrimination.

On February 19, 1976, the District Court rendered a Memorandum of Decision discussing various aspects of Travenol's personnel practices. The court found that Travenol hired

proportionately fewer blacks as operatives, "reflect[ing] the combined effect of a tenth grade education requirement and of the defendants' subjective discrimination." 416 F. Supp. 248, 257 (App. 14a). The court stated no finding that Travenol had an intent to discriminate. It did find that Travenol's management was "well intentioned" but that its policies "adopted in apparent good faith have had the effect of impeding the entry of blacks into the work force." 416 F. Supp. 248, 261 (App. 21a). The court made additional findings as to other allegations of discrimination.

The District Court issued an injunction which, by paragraph number, prohibited Travenol from (1) discriminating against the class on the basis of color, race or sex in employment practices or conditions of employment, (2) requiring a tenth grade education of applicants for employment in operative positions, (3) requiring a twelfth grade education as a condition of employment in office and clerical, technician, and supervisory positions, and (4) requiring a college degree as a qualification for certain analyst positions. A fifth, unnumbered paragraph required Travenol to provide employee coverage for pregnancy and pregnancy-related disabilities in its salary continuation plan.

Travenol noticed an appeal to the Court of Appeals for the Fifth Circuit from the Memorandum of Decision and the injunction. Upon plaintiffs' motion the Court of Appeals dismissed all aspects of the appeal except as to the injunction.

The Court of Appeals issued its opinion and judgment on January 6, 1978. *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (App. 31a-37a). It vacated paragraph (1) of the injunction for failure to satisfy the specificity requirements of Fed. R. Civ. P. 65(d), and vacated paragraph (2) because none of the named plaintiffs had standing to challenge the tenth grade requirement. The court affirmed paragraphs (3) and (4) relating to the twelfth grade and college education requirements, respectively, and upon the parties' joint request, vacated the paragraph relating to pregnancy and pregnancy-related disabilities. The court denied plaintiffs' petition for rehearing and suggestion for rehearing *en banc*, and this Court denied plaintiffs' petition for certiorari. 439 U.S. 835.

Following remand the District Court referred to a special master the issues of "the necessity for and extent of any further injunctive relief," and of entitlement to back pay and its computation. The special master issued his report and recommended decree after additional discovery and a hearing. As to hiring, the decree prohibits Travenol from discriminating subjectively on the basis of race or sex, and requires it to post notices describing job vacancies. It requires Travenol to grant a hiring priority to all unhired class members who seek it, and establishes procedures for class members to claim constructive seniority. The District Court overruled the parties' various objections and adopted the special master's report and decree. (App. 38a-45a).

The parties each noticed an appeal to the Court of Appeals. Travenol challenged the decree as to both its form and the absence of requisite findings as to discrimination in the District Court's February 19, 1976 Memorandum of Decision, upon which the decree was based. Plaintiffs appealed the District Court's denial of additional injunctive relief.

The Court of Appeals required several adjustments in the form of relief, and moved back the opening dates for membership in the class. In holding that Travenol's interviewing system was a means of discrimination in hiring, the court ruled that proof of intent to discriminate was "crucial" and went on to determine that the record established Travenol's discriminatory intent.[1] Travenol petitioned for a rehearing solely on the point that the Court of Appeals erred by independently reviewing Travenol's intent and reversing the District Court's finding. The Court of Appeals denied this petition, as well as plaintiffs' petition for rehearing and suggestion for rehearing *en banc*. (App. 118a).

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[1] This contrasted with its reversal of the District Court's award of constructive seniority to class-member applicants between January 1975 and February 19, 1976. As to that aspect, the Court of Appeals remanded for the District Court to make findings whether or not Travenol discriminated in hiring during this period.

REASON FOR ALLOWING THE WRIT

THE COURT OF APPEALS MADE AN INDEPENDENT FINDING THAT TRAVENOL INTENDED TO DISCRIMINATE IN HIRING WITHOUT REGARD TO THE "CLEARLY ERRONEOUS" STANDARD, CONTRARY TO THIS COURT'S DECISION IN *PULLMAN-STANDARD V. SWINT*

This Court's decision in *Pullman-Standard v. Swint*, ____ U.S.____, 50 U.S.L.W. 4425 (U.S. April 27, 1982), establishes that the Court of Appeals erred by rejecting the District Court's finding that Travenol was "well intentioned" without regard to the "clearly erroneous" standard of Fed. R. Civ. P. 52, and by substituting its own new finding that Travenol intended to discriminate. In *Swint* the Court held that the clearly erroneous standard applies to all findings of fact, and deemed erroneous the rule of the Court of Appeals for the Fifth Circuit that the standard does not apply to ultimate facts. The Court stated,

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

50 U.S.L.W. at 4429.

The District Court in *Swint* found that a seniority system was established without an intention to discriminate, and thus was within the proviso to Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1977). The Court of Appeals ruled that the District Court erred, and determined that the seniority system was created with an intent to discriminate. The court did not apply the clearly erroneous standard to the District Court's contrary finding. Rather, it considered the question of intent

one of ultimate fact which it was free to review independently. The Supreme Court ruled that this was error and that the clearly erroneous standard should have been applied. It stated,

> Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Insofar as the Fifth Circuit assumed otherwise, it erred.

50 U.S.L.W. at 4429-30.

The Court of Appeals determined in the present case that plaintiffs were required to prove that Travenol's interviewing process led to disparate *treatment* which, in turn, requires proof of intent to discriminate. The court initiated its discussion of Travenol's hiring practices with a recitation of how plaintiffs had directed their efforts at trial principally to establishing a disparate *impact* of the tenth grade requirement (for which proof of intent is not required), and noted the District Court's finding that Travenol hired proportionately fewer blacks —" 'reflect[ing] the combined effect of a tenth-grade requirement and of the defendants' subjective discrimination.' 416 F. Supp. at 248." 673 F.2d at 816 (App. 67a). The court continued that its prior decision that the plaintiffs lacked standing to challenge the tenth grade requirement resulted in the removal of this issue and "transformed this case dramatically" into a disparate treatment case, in which proof of intent to discriminate is "crucial." *Id.*

This crucial finding of intent to discriminate is not to be found in the District Court's opinion. Understandably. The District Court had proceeded on a disparate impact basis, which did not require proof of intent. But what is more important, the District Court had reached its conclusion of liability on an impact basis in the face of its express recognition that Travenol did not have an intent to discriminate. Indeed, the District Court found specifically that defendants did *not* intend to discriminate:

> The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees, equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force.

416 F. Supp. at 261 (App. 21a).

The Court of Appeals did not address this finding that Travenol was "well intentioned." Nor did it or could it point to language elsewhere in the District Court's Memorandum of Decision which could be considered a finding of discriminatory intent. It simply held that plaintiffs had proved a prima facie disparate treatment case. It did so by referring to statistics showing a disparate result, combined with an early history of discrimination, "opportunities in [the] ... hiring process to discriminate," and discrimination against the three named plaintiffs. 673 F.2d at 819 (App. 73a). It assessed the evidence of disparate result by applying the "clearly erroneous standard to the district court's *subsidiary* findings of fact." 673 F.2d at 820 (App. 75a) (emphasis supplied).[2] The court inferred from these subsidiary findings the otherwise absent element of intent, treating it as an ultimate fact, which under the rule of the circuit at the time it was free to review as if a question of law. (See the court's citations (673 F.2d at 820 (App. 75a)) to *Rivera v. City of Wichita Falls*, 665 F.2d 531, 535-36 (5th Cir. 1982); and *Danner v. United States Civil Service Commission*, 635 F.2d 427, 430-31 (5th Cir. 1981), examples of the court's application of different standards of review to subsidiary and ultimate facts.) This substitution of a new finding of intent inferred as it

[2] In so doing, the court referred to three statistical compilations. One, set forth in footnote 32 of the opinion, had been introduced in evidence in exhibit form. The other two, in footnotes 33 and 34, were charts presented as such for the first time in plaintiffs' appellate briefs. 673 F.2d at 820 (App. 77a).

must have been from subsidiary facts is impermissible under *Swint*. All the more so when the District Court had expressly made a contrary finding on the precise issue.

The Court of Appeals upheld injunctive relief against subjective discrimination by applying a different standard from the District Court. That different standard, disparate treatment, required a finding, intent, not required by the impact standard of the District Court and contrary to its finding on this precise question. As in *Swint*, the Court of Appeals substituted its factual finding for that of the District Court in order to support the legal conclusion it determined to reach. The Court of Appeals should have instead tested the District Court's finding on the intent question by the clearly erroneous standard of Rule 52. Travenol's petition for certiorari should be granted. The judgment below should be summarily vacated and the matter remanded for reconsideration in light of *Swint*. *White-Wilson Medical Clinic v. Robbins*, ____ U.S. ____, 50 U.S.L.W. 3915 (U.S. May 4, 1982).

CONCLUSION

In light of *Pullman-Standard v. Swint,* the petition for a writ of certiorari should be granted, the judgment below summarily vacated, and the matter remanded for reconsideration. Should the Court regard summary action as inappropriate, the writ should be granted for all of the reasons set forth above.

Respectfully submitted,

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